LIBRARY
SUPREME COURT, U. S.

FILED
SEP 5 1973
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1973
No. 73-423

PENN CENTRAL TRANSPORTATION COMPANY,
Petitioner,

vs.

LEONARD L. EDSALL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

THOMAS R. SKULINA
420 Standard Building
Cleveland, Ohio 44113
Attorney for Petitioner

JOHN F. DOLAN
420 Standard Building
Cleveland, Ohio 44113
Of Counsel

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

OPINIONS BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
STATUTES INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 5

The Questions Presented Are of Importance in the Administration of Trials 5

CONCLUSION 7

APPENDIX:

A. Order of the District Court (Sept. 6, 1972) 9
B. Opinion of the Court of Appeals (May 22, 1973) 10
C. Order of the Court of Appeals Denying Petition for Rehearing (June 7, 1973) 14
D. Pre-Trial Order of the District Court (July 5, 1972) 15
E. Order of the District Court (July 21, 1972) 16
F. Exhibits 17

TABLE OF AUTHORITIES

Cases

Bautista v. Concentrated Employment Program of Dept. of Labor, 459 F.2d 1019 (9th Cir. 1972) 6
Berardi v. The Pure Oil Corporation, 456 F.2d 98 (6th Cir. 1972) 6
Edsall v. Penn Central Transportation Co., ...F.2d ..... (6th Cir. 1973) 6
Link v. Wabash R. Co., 370 U.S. 626 (1962) 6
Pond v. Braniff Airways, 453 F.2d 347 (5th Cir. 1972) 6
Sloup v. Hershey, 457 F.2d 148 (7th Cir. 1971) 6
Theilmann v. Rutland Hospital, Inc., 455 F.2d 853 (2nd Cir. 1972) 6

Statutes

28 U.S.C., Section 1254(1) 2
45 U.S.C., Section 51 ..... 2, 5

Supreme Court of the United States

October Term, 1973

No. _____

PENN CENTRAL TRANSPORTATION COMPANY,
Petitioner,

vs.

LEONARD L. EDSALL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered after denial of Petition for Rehearing on June 8, 1973.

OPINIONS BELOW

The opinions in the Courts below have not been reported. The order of the Trial Judge dismissing the cause of action without prejudice for want of prosecution is appended hereto as Appendix "A". The opinion of the Sixth Circuit reversing the Trial Judge is appended hereto as Appendix "B" and the order denying the petition for rehearing is appended hereto as Appendix "C".

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was filed on May 22, 1973. A timely petition for rehearing was denied on June 7, 1973. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Does a Trial Judge have the authority to dismiss without prejudice an action brought under the Federal Employers' Liability Act, 45 U.S.C., Sec. 51, for failure to prosecute?

2. Does notice of an order setting a trial date and ordering replacement counsel if necessary served upon the attorney constitute notice to his client?

3. May a Trial Judge dismiss an action brought by a railroad employee under the Federal Employers' Liability Act where neither he nor his counsel appear in court though a notice of trial was served upon both the attorney and the railroad employee?

STATUTES INVOLVED

45 U.S.C., Section 51.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is em-

ployed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin, dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE

On July 5, 1972 the Trial Judge issued a pre-trial order (Appendix D) in which trial was set in the case for July 27, 1972 at 10:00 o'clock A.M.

On July 21, 1972 a subsequent order was entered: (Appendix E). The court found that counsel for Mr. Edsall was physically incapacitated and postponed the July 27, 1972 trial date until September 5, 1972. The court in its order stated "No additional continuance will be granted, and it is FURTHER ORDERED that in the event John Ruffalo, Sr. is unable to proceed on the date heretofore indicated, replacement counsel will be prepared to proceed as aforesaid."

On August 31, 1972 notice of trial to commence on September 5, 1972 at 10:00 A.M. was sent by certified mail both to counsel for the plaintiff and to the plaintiff himself (Appendix F).

On September 6, 1972 the Trial Judge filed an order finding that "this case having been called for trial and there having been no appearance by the plaintiff or his attorney, and it appearing to the Court that notice of trial has been served upon both the plaintiff and his attorney, . . ." (Exhibit A), it was, therefore, ordered by the Court that the complaint be dismissed without prejudice for want of prosecution at plaintiff's costs. At that time the statute of limitations for the prosecution of a Federal Employers' Liability Act had not yet expired with respect to the first cause of action.

The Sixth Circuit Court of Appeals reversed the Trial Judge and denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

The Questions Presented Are of Importance in the Administration of Trials

The issue raised by this appeal confronts this Court with the question of law involving the right of discretion of a Trial Judge to administer court proceedings including the discretion to impose reasonable sanctions when the Trial Judge's orders are disregarded in the first instance by an attorney and in the second instance both the attorney and by the claimant himself. The first instance refers to a notice of trial with a provision that substitute counsel must be retained in the event of unavailability for trial which was sent to the attorney. The second order relating to a trial date was sent to both the attorney and the claimant.

The Circuit Courts have not been uniform in upholding the discretionary power of the Trial Judge and a decision from this Court clarifying the extent of a Trial Judge's discretion is of great importance to all District Judges and to all practitioners and claimants who appear in trials of any kind.

1. DOES A TRIAL JUDGE HAVE THE AUTHORITY TO DISMISS WITHOUT PREJUDICE AN ACTION BROUGHT UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, 45 U.S.C. SEC. 51, FOR FAILURE TO PROSECUTE?

2. DOES NOTICE OF AN ORDER SETTING A TRIAL DATE AND ORDERING REPLACEMENT COUNSEL IF NECESSARY SERVED UPON THE ATTORNEY CONSTITUTE NOTICE TO HIS CLIENT?

3. MAY A TRIAL JUDGE DISMISS AN ACTION BROUGHT BY A RAILROAD EMPLOYEE UNDER THE

FEDERAL EMPLOYERS' LIABILITY ACT WHERE NEITHER HE NOR HIS COUNSEL APPEAR IN COURT THOUGH A NOTICE OF TRIAL WAS SERVED UPON BOTH THE ATTORNEY AND THE RAILROAD EMPLOYEE?

Though this Honorable Court in the case of *Link v. Wabash R. Co.*, 370 U.S. 626 (1962) established that a Trial Judge has the authority to dismiss the plaintiff's action with prejudice because of failure to prosecute [in that case missing a pre-trial conference], the Circuit Courts have strayed from the law of that case and have substituted different guide lines with respect to the discretionary power of a Trial Judge to issue sanctions of dismissal for want of prosecution.

Examples of the Circuit Courts' disagreements may be found in the opinions of the Fifth and Sixth Circuits as opposed to opinions in the Second, Seventh and Ninth Circuits.

Abuses of discretion were found by the Fifth Circuit in *Pond v. Braniff Airways*, 453 F.2d 347 (5th Cir. 1972); *Berardi v. The Pure Oil Corporation*, 456 F.2d 98 (6th Cir. 1972); and in the instant case, *Edsall v. Penn Central Transportation Co.*, ... F.2d ..... (6th Cir. 1973).

Aligned on the side of supporting the discretionary powers of the Trial Judge are the Second, Seventh and Ninth Circuits: *Theilmann v. Rutland Hospital, Inc.*, 455 F.2d 853 (2nd Cir. 1972); *Sloup v. Hershey*, 457 F.2d 148 (7th Cir. 1971); and *Bautista v. Concentrated Employment Program of Dept. of Labor*, 459 F.2d 1019 (9th Cir. 1972).

The obvious insecurity of a system of judicial administration is apparent where an Appellate Court can substitute its own judgment for that of the Trial Judge in the day-to-day setting of cases for trial. In the instant case the Trial

Court gave ample warning to the attorney for the plaintiff that the case was to go to trial on the 5th of September.

The original pre-trial order (Appendix D) scheduled trial for July 27, 1972 at 10:00 A.M. Thereafter, on July 21, 1972 (Appendix E) in response to a continuance sought by plaintiff's counsel the Court then ordered a continuance until September 5, 1972 and indicated that if plaintiff's counsel was unable to proceed that replacement counsel should be prepared to proceed in his stead. The Court sent another order advising of the date of trial five days before time and not only sent it to plaintiff's counsel by certified mail but also sent it to the claimant. The cases were then dismissed, but since the action by which the client brought the case was in the words of the Sixth Circuit ". . . a remedial and humanitarian statute" the Appellate Court would not "punish" the client for the behavior of the lawyer.

CONCLUSION

It would seem, therefore, that if a cause of action is brought under a statute with some humanitarian motivation behind it, then the petitioner can ignore a notice to be at trial and does not have to be concerned about orders directing his attorney to be at court or seek a replacement within six weeks.

Yet if an individual is merely run over by a Greyhound Bus and sues on a diversity basis, that person had better pay attention to court orders less the trial court is permitted to exercise its discretion and impose sanctions for utter disregard of its orders. Or perhaps personal injury might be considered "humanitarian", then the trial court has less discretion.

The test of whether a trial judge has acted unreasonably should not have anything to do with the type of civil case before him. Administration of justice must involve rules and orderly procedures or anarchy of a sort shall replace fair and equal treatment through an orderly process.

The power and authority of a Trial Judge indeed is denuded when he cannot order a trial to commence within a reasonable period and cannot expect either an appearance or some attempt to interpose an excuse for a failure to be ready to proceed. In the instant case, *no one,* neither the lawyer nor the client came to court to seek an extension or proffer some excuse why the case could not proceed. This is, and should be treated as, an affront to the Court. It certainly is a failure to prosecute and the sanction of dismissal *without* prejudice seems fitting and within the exercise of reasonable judicial discretion.

Hence petitioner respectfully requests this Honorable Court to review this case.

Respectfully submitted,

THOMAS R. SKULINA
420 Standard Building
Cleveland, Ohio 44113
Attorney for Petitioner

APPENDIX A
Order of the District Court

(Filed September 6, 1972)

No. C70-594

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD L. EDSALL,
Plaintiff,

vs.

PENN CENTRAL TRANSPORTATION COMPANY,
Defendant.

ORDER

KRUPANSKY, *J.* :

Upon consideration, this case having been called for trial and there having been no appearance by the plaintiff or his attorney, and it appearing to the Court that notice of trial has been served upon both the plaintiff and his attorney,

IT IS ORDERED that the complaint herein is dismissed without prejudice for want of prosecution at plaintiff's costs.

/s/ ROBERT B. KRUPANSKY
United States District Judge

APPENDIX B
Opinion of the Court of Appeals

(Filed May 22, 1973)

No. 72-1995

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD L. EDSALL,
Plaintiff-Appellant,

v.

PENN CENTRAL TRANSPORTATION COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed May 22, 1973.

Before: PHILLIPS, Chief Judge, McCREE, and LIVELY, Circuit Judges.

PER CURIAM. We consider the appeal of a Federal Employers' Liability Act claimant whose complaint was dismissed without prejudice on September 6, 1972, because neither he nor his counsel of record appeared in court to proceed with the trial of his case when it was called on September 5. The trial date had been set in an order filed by the District Judge on July 21, 1972, and the order further provided:

> No additional continuance will be granted, and it is FURTHER ORDERED that in the event John Ruffalo, Sr. is unable to proceed on the date heretofore indicated, replacement counsel will be prepared to proceed as aforesaid.

Although the order of dismissal purported to be without prejudice, the three-year statute of limitations (45 U.S.C. § 56) had run on one of plaintiff's claims, and the statute ran on plaintiff's other claim two weeks later.

Appellant's counsel argues that he did not appear to try the case because he had been ill and had so apprised the court in July.[1] He claims that he endeavored to telephone the District Judge a few days before the trial date but that the Judge was unavailable. (This period included the Labor Day weekend.)

We regard the attorney's efforts as totally insufficient. He could have but did not write to the court to request a continuance. He could have but did not ask another lawyer to answer the call of the case to explain his absence and to request a continuance. He could have but did not arrange for his client to be present to explain the indis-

---

1. The letter, dated July 20, 1972, read as follows:

Dear Judge Krupansky:

I am enclosing herewith a letter from Dr. John N. McCann of Youngstown, Ohio in respects to his medical advice relating to my present physical condition.

Dr. McCann, as you will note, advises that I cease activities for a period of one month and will evaluate me again at that time as to the likelihood of my resuming my activities or whether to continue on the basis of his original medical advice or on a restricted activity basis.

I regret that I am unable to fulfill my obligations at this time but matters concerning my health must be given first priority. As soon as my physician advises me that I can return to active duty, I will notify you.

SS: John Ruffalo

position of his lawyer and to request a continuance. He could have but did not obtain replacement counsel to try the case in his stead (he did manage to secure replacement counsel by October 1).

The failure to accord opposing counsel and the court this minimum consideration and courtesy in these days of crowded calendars would ordinarily have fully justified the drastic sanction of dismissal of the cause. However, there are special circumstances here. The record does not indicate that Mr. Edsall knew of the requirement in the July 21 order that he be prepared to proceed with replacement counsel if Mr. Ruffalo should have been unavailable, and in the absence of the affirmative showing of such knowledge we are reluctant to punish the client for the behavior of the lawyer. Further, plaintiff's claims are now time-barred and the dismissal thus effectively prevents plaintiff from ever having his day in court. And, the relief he seeks is based on a remedial and humanitarian statute that was specially enacted by Congress to afford relief to employees from injury incurred in the railway industry. *See Urie v. Thompson*, 337 U.S. 163 (1949).

Accordingly, as we said in *Berardi v. Pure Oil Corporation*, 456 F.2d 98, 99 (6th Cir. 1972), "we are hard-pressed to find an abuse of discretion in the court's dismissal, and do so only because we believe that the interests of justice require that [appellant] be afforded one more opportunity to conform [his actions] to the court's orders." Any further delay occasioned by appellant or his counsel will not evoke the same special solicitude on our part, and we expressly reject counsel's contention that the court was without power to enter the dismissal order. We reverse only because in balancing the equities, the interest of the employee who claims injury (not his counsel) out-

weighs, if only slightly so, the interest of the railroad and the concern of the court for its calendar, on these facts.

We decline to consider the issues relating to discovery because as the case now stands they are interlocutory in nature and review of them may never be required.

Reversed and remanded for further proceedings consistent herewith. Costs will abide the outcome of the case on its merits.

APPENDIX C
Order of the Court of Appeals Denying Petition for Rehearing

(Filed June 7, 1973)

No. 72-1995

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD L. EDSALL,
Plaintiff-Appellant,

vs.

PENN CENTRAL TRANSPORTATION CO.,
Defendant-Appellee.

ORDER

BEFORE: PHILLIPS, Chief Judge, McCREE, and LIVELY, Circuit Judges.

The petition for rehearing having come on to be heard, and although it appears therefrom that plaintiff-appellant had been advised of the trial date, it does not appear that he had been told that no continuance would be permitted. Upon consideration, it is ORDERED that the petition be, and it hereby is, DENIED.

Entered by order of the court.

/s/ JAMES A. HIGGINS
Clerk

APPENDIX D
Pre-Trial Order of the District Court
(Filed July 5, 1972)

No. C70-594

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD L. EDSALL,
Plaintiff,

vs.

PENN-CENTRAL TRANS. CO.
Defendant.

PRE-TRIAL ORDER

A pre-trial conference was held before Judge Robert B. Krupansky on July 5, 1972. Counsel appearing for the parties were:

Plaintiff John Ruffalo

Defendant Thomas R. Skulina

As a result of the pre-trial the following orders were entered in regard to the pleadings, discovery and trial:

1. Defendant will take plaintiff's deposition on July 13, 1972.

2. Defendant will respond to outstanding interrogatories of plaintiff and to plaintiff's request for discovery by July 10, 1972.

3. Trial is set July 27, 1972 at 10:00 a.m.

IT IS SO ORDERED:

/s/ ROBERT B. KRUPANSKY
United States District Judge

APPENDIX E
Order of the District Court

(Filed July 21, 1972)

Civil No. C70-594

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD L. EDSALL,
Plaintiff,

v.

PENN CENTRAL TRANSPORTATION COMPANY,
Defendant.

ORDER

KRUPANSKY, *J.*

It appearing to the Court that John Ruffalo, Sr. is physically incapacitated, and thereby unable to proceed with the trial of this cause scheduled to commence July 27, 1972, the matter is continued to September 5, 1972.

No additional continuance will be granted, and it is FURTHER ORDERED that in the event John Ruffalo, Sr. is unable to proceed on the date heretofore indicated, replacement counsel will be prepared to proceed as aforesaid.

It is FURTHER ORDERED that the defendant Penn Central Transportation Company's Motion for Production of Documents is granted and said documents will be produced by not later than July 27, 1972.

IT IS SO ORDERED.

/s/ ROBERT B. KRUPANSKY
United States District Judge

APPENDIX F

AFFIDAVIT:

STATE OF OHIO)
) SS.
COUNTY OF CUYAHOGA)

I, Tom C. Samford, being first duly sworn upon my oath, depose and say:

1. I am and have been employed as a deputy clerk for the Northern District of Ohio, Eastern Division, at Cleveland, Ohio.

2. On August 31, 1972 I prepared and mailed by certified mail a notice of trial for September 5, 1972 in the case of Leonard L. Edsall v. Penn Central Transportation Co., C70-594, to Leonard L. Edsall, 2918 W. Federal St., Youngstown, Ohio 44503, certified copies of which notice and return receipts therefor are attached herewith.

Further affiant sayeth not.

Tom C. Samford
Tom C. Samford

Subscribed and sworn to before me by Tom C. Samford this 25th day of May, 1973.

Notary Public
ROBERT B. KRUPANSKY
United States District Judge
Northern District of Ohio

NOTICE OF TRIAL D. C. Form No. 18 (Rev. Sept. 1953)

United States District Court

FOR THE

NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Leonard L. Edsall

v.

Penn Central Trans. Co.

No. C70-594

TAKE NOTICE that the above-entitled case has been set for trial at Cleveland, Ohio, on Tues. Sep. 5, 19 72, at 10:00 a.m. before Hon. Robert B. Krupansky, U. S. District Judge, Room 238, U. S. Courthouse, Cleveland.

Date Aug. 31, 19 72

Dominic J. Cimino Clerk.

By T. C. Samford Deputy Clerk.

743-2156

To John Ruffalo
510 Mahoning Bank Bldg.
Youngstown, Ohio 44503

Leonard L. Edsall
2918 W. Federal St.
Youngstown, Ohio 44503

Thomas R. Skulina
420 Standard Bldg.
Cleveland, Ohio 44113

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Dominic J. Cmino, Clerk
U. S. District Court
Northern District of Ohio

By T. C. Samford Deputy Clerk

No. 674477

RECEIPT FOR CERTIFIED MAIL—30¢

SENT TO John Ruffalo

STREET AND NO. 510 Mahoning Bank Bldg

P.O., STATE, AND ZIP CODE Youngstown, Ohio 44503

EXTRA SERVICES FOR ADDITIONAL FEES

Return Receipt

Shows to whom and date delivered	Shows to whom, date, and where delivered	Deliver to Addressee Only
☒ 10¢ fee	☐ 35¢ fee	☐ 50¢ fee

POD Form 3800 Mar. 1966 NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL (See other side)

No. 650005

RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

SENT TO Leonard L. Edsall

STREET AND NO. 2918 W. Federal St.

P.O., STATE AND ZIP CODE Youngstown, Ohio 44503

POSTMARK OR DATE

OPTIONAL SERVICES FOR ADDITIONAL FEES

RETURN RECEIPT SERVICES	1. Shows to whom and date delivered With delivery to addressee only	15¢
	2. Shows to whom, date and where delivered With delivery to addressee only	25¢
DELIVER TO ADDRESSEE ONLY		85¢
SPECIAL DELIVERY (extra fee required)		50¢

PS Form Nov. 1971 3800 NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL (See other side)

POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

POSTMARK OF DELIVERING OFFICE

Print your name and address below. If you want to restrict delivery, or to have the address of delivery shown on this receipt, check block(s) on other side. Moisten gummed ends and attach this card to back of article.

RETURN TO

POD Form 3811 Apr. 1970

Hon. Robert B. Krupansky
U. S. District Judge
248 U. S. Courthouse
Cleveland, Ohio 44114

POD Form 3811 Apr. 1970

POSTMARK OF DELIVERING OFFICE

Print your name and address below. If you want to restrict delivery, or to have the address of delivery shown on this receipt, check block(s) on other side. Moisten gummed ends and attach this card to back of article.

RETURN TO

Hon. Robert B. Krupansky
U. S. District Judge
248 U. S. Courthouse
Cleveland, Ohio 44114

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Dominic J. Cmino, Clerk
U. S. District Court
Northern District of Ohio

By: _____
Deputy Clerk

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S). REQUIRED FEE(S) PAID.

[X] Show to whom, date and address where delivered [ ] Deliver ONLY to addressee

RECEIPT

Received the numbered article described below.

REGISTERED NO.

CERTIFIED NO. 674477

INSURED NO.

DATE DELIVERED SEP 7 1972

SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*) John Kaffalo

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

SHOW WHERE DELIVERED (*only if requested*) 710 Rockefeller Bank Bldg. Cleveland, Ohio 44513

P 13—68—72340-11 347-188 GPO

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S). REQUIRED FEE(S) PAID.

[X] Show to whom, date and address where delivered [ ] Deliver ONLY to addressee

RECEIPT

Received the numbered article described below.

REGISTERED NO.

CERTIFIED NO. 650005

INSURED NO.

DATE DELIVERED 9-2-72

SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*) Leonard Edwards

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

SHOW WHERE DELIVERED (*only if requested*)

P 13—68—72340-11 347-188 GPO

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Dominic J. Cmino, Clerk
U. S. District Court
Northern District of Ohio

By V C Lampard 9-2-72
Deputy Clerk

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 1 1973
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1973
No. 73-423

PENN CENTRAL TRANSPORTATION COMPANY,
Petitioner,

vs.

LEONARD L. EDSALL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

JOHN RUFFALO
510 Mahoning Bank Building
Youngstown, Ohio 44503
Attorney for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO – TEL. (216) 621-5647

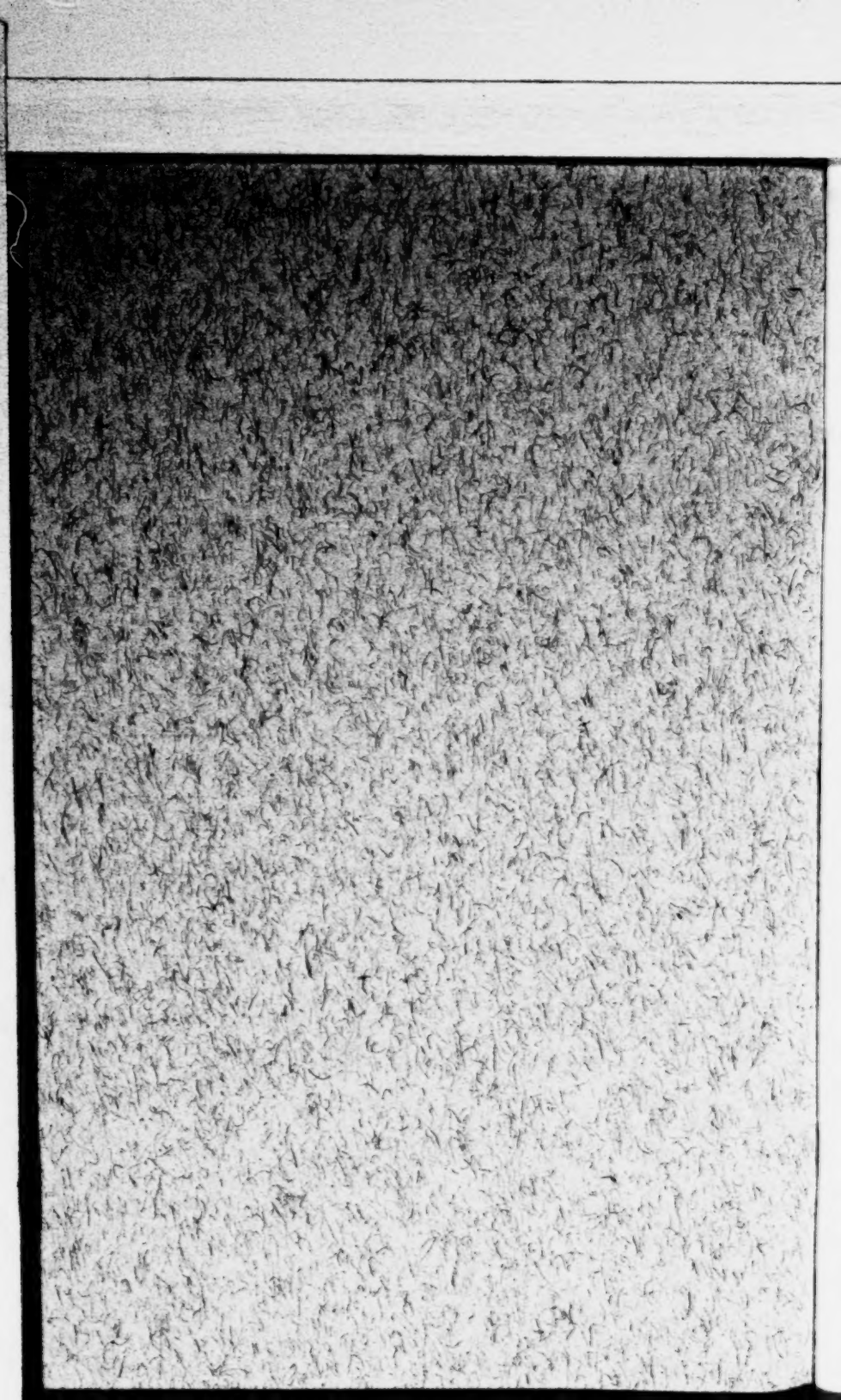

TABLE OF CONTENTS

STATEMENT OF CASE 1

Fact Basis of the Claims 2

Progress of the Proceedings 2

Facts Relevant to Dismissal 5

Finding of Appeals Court 7

LAW AND ARGUMENT 8

No Basis for Review 8

Decisions of Petitioner Do Not Support Granting of the Writ 8

Decisions Supporting Challenged Judgment 14

CONCLUSION 16

APPENDIX:

Docket Entries 17

Physician's Letter 20

Motion Enlargement of Time (Hospitalization) 21

TABLE OF AUTHORITIES

Cases

Baillio v. Wilson (La. 1827), 6 Martin Reports N.S. 334 16

Bautista v. Concentrated Employment Program of the Department of Labor et al., 459 F.2d 1019 (9th Cir. 1972) 12, 13

Berardi v. The Pure Oil Corporation, 456 F.2d 98 (6th Cir. 1972) 10, 13

Courtney v. Central Trust Co., 150 So. 276 (Sup. Ct. Fla., 1933) 15

Foxboro Co. v. Fischer & Porter Co., 29 F.R.D. 522 (U.S.D.C., E.D. Pa. 1961) 15

Hunter v. Fairfax's Devisee, 3 (U.S. Reports, 1796) Dallas 305 ..... 14, 15

Layne & Bowler v. Western Well Works, Inc., 261 U.S. 387 (1923) 8

Link v. Wabash R. R. Co., 370 U.S. 626, 8 L. Ed. 2d 734, reh. den. 371 U.S. 873 (1962) 8, 9, 13

Marrero, et al. v. Nunez, et al., 3 La. Ann. 54 (1848) 16

S.S. Monrosa v. Carbon Black Export Inc., 359 U.S. 180, 3 L. Ed. 2d 723 (1959) 8

Nowaczyk v. Welch, 245 N.E.2d 894 (Ill. 1969) 15

Pond v. Braniff Airways, Inc., 453 F.2d 347 (5th Cir. 1972) 10, 13

Rankin v. Shayne Bros. Inc., 280 F.2d 55 (C.A., Dist. Col. Cir. 1960) 15

Sloup v. Hershey, 457 F.2d 148 (7th Cir. 1971) 12, 13

Theilmann, Admr. v. Rutland Hospital Inc., 455 F.2d 853 (2d Cir. 1972) 11, 13

Thompson v. Hays, 45 S.E. 970 (Ga. 1903) 15
Wisconsin Electric Co. v. Dunmore Co., 282 U.S. 813, 75 L. Ed. 728 (1931) 8

Statutes

45 U.S.C.A. § 56 7

Supreme Court of the United States

October Term, 1973
No. 73-423

PENN CENTRAL TRANSPORTATION COMPANY,
Petitioner,

vs.

LEONARD L. EDSALL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

THE STATEMENT OF THE CASE

The proceedings in review stem from an Order entered by the Trial Court in directing replacement of Respondent's counsel if unable to proceed with trial by September 5, 1972 because of illness (a diagnosed malignant tumor or growth) and the further Order of the Court dismissing said cause without prejudice for the want of prosecution (Pet. 16 a) when counsel for Respondent was unable to attend trial because of said illness.

Fact Basis of the Claims

Leonard L. Edsall, a conductor, employed by the Penn Central Transportation Company, in his Complaint alleged two causes of action for personal injuries which occurred on or about the 15th day of November, 1968 and on or about the 21st day of September, 1969 under the Federal Employers' Liability Act (45 U.S.C.A. 51 *et seq.*).

The injury of the 15th day of November to his back, shoulders and arms occurred when he stumbled and fell over a lump of coke and other debris lying within a walkway as he was assisting in coupling cars and assembling a train.

The injury of September 21, 1969 happened while Respondent was at a lodging provided by the railroad in a depressed area of the city when he and members of the crew went to a diner to have breakfast preparatory to a call of duty at 1:00 o'clock A. M. Respondent on returning from the diner at about 12:30 A. M. was struck on the head by an unknown assailant as he entered the Y.M.C.A. and sustained a concussion of the brain, laceration of the scalp which bled profusely and a severe heart attack.

Progress of the Proceedings

Respondent filed his FELA claims on the 25th day of June, 1970. Interrogatories were propounded and Answers of the Petitioner to Interrogatories were filed on October 1, 1971. A Pre-trial Conference was ordered for July 5, 1972 with a trial date of July 10, 1972. Respondent informed the Court that Petitioner had failed to answer certain Interrogatories and had likewise failed to produce documents in compliance with the Federal Court Rules.

The Court ordered Petitioner to answer the Interrogatories, produce the documents requested and set the trial date for July 27, 1972. In its order the Court directed that Petitioner respond to the Interrogatories, and the request for discovery by July 10, 1972, prior to Petitioner's taking of the deposition of the Respondent on July 13, 1972 which deposition was requested at pre-trial (Pet. 15 a).

Respondent on July 10, 1972 did not receive the answers to the interrogatories nor did he receive the items which were to be produced by the Petitioner as ordered by the Court. Petitioner, however, on July 11, 1972 propounded Interrogatories to the Respondent. Respondent on July 13, 1972 appeared for the deposition and after the deposition was under way Petitioner produced some of the documents for the purpose of impeaching the Respondent. Respondent objected to the production and use of the documents as not being in accord with the Court's Order of July 5, 1972 (Pet. 15 a).

Petitioner on July 19, 1972 filed a Motion For Production of Documents and a Protective Order seeking to extend the trial date of July 27, 1972 in order to obtain several hospital records of the Respondent including his Naval Service records from the General Service Administration, St. Louis, Missouri which required three months time, being received on October 24, 1972.

Respondent's counsel on July 20, 1972 unaware of Petitioner's Motion to extend the trial date directed a letter to the Court advising it of his illness and inability to meet the trial date (Pet. 11 a).

The Court on July 21, 1972 sustained the Motion of Petitioner for Production of Documents and Protective Order (Pet. 16 a). The Court further stating it appears

that John Ruffalo, Sr., is physically incapacitated and the trial date would be continued until September 5, 1972, that no additional continuances would be granted and in the event John Ruffalo, Sr.* was unable to proceed by September 5, 1972 replacement counsel would be ordered (Pet. 16 a).

The ruling and order of the Court respecting the Motion For Production of Documents, the Protective Order and the replacement of Respondent's counsel was docketed on July 24, 1972 (p. 18, *infra*) and the Order was received by Respondent on July 25, 1972. On July 25, 1972 previous to the receipt of the Court's Order sustaining Petitioner's Motion For Production and Protective Order and directing of replacement of counsel, Respondent filed a Brief in Opposition to Petitioner's Motion For Production (p. 18, *infra*). Since Respondent had not been afforded the prescribed ten (10) days under the local rule 2 (a) (3) in which to file his Brief in Opposition to the Motion of the Petitioner, Respondent on July 28, 1972 filed a Motion for Reconsideration and to Vacate the Order of July 21, 1972 (p. 19, *infra*).

On August 18, 1972 the Court summarily overruled Respondent's Motion to Reconsider and Vacate the July 21st Order respecting Production of records, Replacement of Counsel and the setting of the trial date as being without merit (p. 19, *infra*) and created as the Order now stood a contradiction of orders incompatible with the trial date of September 5, 1972 for the time needed to procure the hospital records under the Order of July 21, 1972 would take at least three months.

---

*(John Ruffalo, Sr., is deceased; John Ruffalo, Jr., is sole counsel.)

On August 29, 1972, Respondent timely filed a Notice of Appeal from the Final Order of the Trial Court ordering replacement of counsel, the setting of the trial date and the production of records. Service of the Notice of Appeal was made upon Petitioner on the 29th. Again, on October 6, 1972 he timely filed a Notice of Appeal from the Trial Court's Final Order of September 6, 1972 dismissing said causes without prejudice and for want of prosecution and from the previous Order of July 21, 1972 (docketed July 24, 1972) as to the replacement of counsel (p. 19, *infra*).

Facts Relevant to Dismissal

Petitioner states that the Deputy Clerk of the Trial Court on August 31, 1972 notified Respondent and his counsel by certified mail of the trial date of September 5, 1972, which notices were receipted for on September 2, 1972. However, prior to the receipt of the notices, Respondent's counsel on September 1, 1972 called the Trial Court and spoke to the Deputy Clerk when he was unable to speak to the Trial Court and related to the Clerk that he was not physically able to appear for the trial.

Counsel unable to speak to the Trial Court immediately thereafter contacted the Chief Judge to explain that he was unable to advise the Trial Court that he was not physically and mentally capable of trying the case on September 5, 1972 and asked if he could contact the Trial Court and explain that counsel was seeking a continuance because of his illness. Later that same day, September 1, 1972, he contacted the Chief Judge and was advised that the case would be dismissed *and that Respondent need not appear.*

Respondent was ready and prepared to try the case on July 10, 1972 as originally ordered and so informed

the Court at pre-trial. The dilatory pleading of the Petitioner delayed the proceedings to and beyond the trial date of July 27, 1972. Respondent had nothing to do with prolonging the day of trial for over two years. Counsel's illness affected the trial date only after the expiration of two years and played a small but excusable part in any protraction of the trial day.

Respondent says that counsel had been restricted in his work activities by his physician for a period of at least thirty (30) days or more depending upon the results of tests and examinations which were being made respecting the state of his health (p. 20, *infra;* Pet. 11 a). That the Court had been advised as to the limitations upon his activities and informed "that as soon as my physician advises me that I can return to active duty, I will notify you" (Pet. 11 a).

Respondent says that counsel was undergoing certain examinations by his physicians, Dr. John N. McCann and Dr. C. Edward Pichette, as to the malignancy of a tumor or growth in his body. Respondent says that at the conclusion of these examinations counsel entered the University Hospital in Cleveland, Ohio on October 29, 1972 under the care of Dr. Lester Persky (specialist in Cancer) for the surgical removal of a suspected malignant tumor or growth, was discharged from the hospital on November 7, 1972 and confined to his home until November 27, 1972 (p. 21, *infra*).

Respondent says that counsel was not physically or mentally capable of trying the case under the conditions of his health and that his counsel informed the Trial Court, other District Judges (District Judge Contie continued eight (8) cases for Counsel) and Chief Judge of the District Court, Northern District of Ohio, Eastern Division, by letters similar in content dated July 20, 1972 (p. 20,

infra; Pet. 11 a), on subsequent occasions in person and by telephone on Sept. 1, 1972 prior to the date of trial of Respondent's case.

The order of dismissal of September 6, 1972 precluded Respondent from refiling his complaint since the three year statute of limitations had run against the claim of November 15, 1968. This 1968 claim was equally as important as the claim of September 21, 1969. A dismissal whether with or without prejudice would not have altered the drastic consequences in which Respondent was placed by the order of dismissal.

> "Title 45 U.S.C.A. § 56. No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

Respondent diligently tried to retain other counsel in accordance with the Trial Court order but was unable to do so until October 1, 1972. Other counsel would only aid to preserve the claim if it could be refiled at Youngstown, Ohio. Other counsel on October 6, 1972 filed a claim in the Common Pleas Court of Mahoning County, Ohio (Case No. 72 CI 1522) pleading the saving clause. The case is presently pending in that Court.

Finding of Appeals Court

On appeal, the Sixth Circuit Court on the 22nd day of May, 1973 found that the Trial Court committed an abuse of discretion in dismissing the case and reversed because the balancing of the equities in the interests of the employee outweighs the interests of the railroad and the concern of the Court for its calendar (Pet. 12 a).

Petitioner duly filed a Petition for Rehearing and the Circuit Court on June 7, 1973 denied the petition on the

ground that although it appears therefrom that plaintiff-appellant had been advised of the trial date, it does not appear that he had been told that no continuance would be permitted (Pet. 14 a).

LAW AND ARGUMENT

No Basis for Review is Shown

The Writ should be denied:

1. Grant of review would be contrary to the established rule of the Court that such writs are impermissible when there is no conflict in the application of the law as between the different Courts of Appeals. *Layne & Bowler v. Western Well Works, Inc.*, 261 U.S. 387, 392-393, 67 L. Ed. 713, 714; *S. S. Monrosa v. Carbon Black Export Inc.*, 359 U.S. 180, 184, 3 L. Ed. 2d 723, 726.

2. The challenged judgment rests upon its own independent facts and the application of the law to those facts which are completely different from the facts of the decisions relied upon by the Petitioner as being in conflict with other Appellate Courts. *Wisconsin Electric Company v. Dunmore Company*, 282 U.S. 813, 75 L. Ed. 728.

Decisions Relied Upon by the Petitioner Do Not Support its Reasons for Granting the Writ

In *Link v. Wabash R. R. Company*, 370 U.S. 626, 8 L. Ed. 2d 734, reh. den. 371 U.S. 873, 9 L. Ed. 2d 112 (1962), plaintiff commenced action on August 24, 1954 and defendant answered on April 30, 1955. Case was set for hearing on July 17, 1957 and on Motion of plaintiff it was vacated. On Aug. 17, 1957 defendant filed Interroga-

tories. On Feb. 24, 1959, notice was given pursuant to Local Rule that the cause would be dismissed on March 25, 1959 unless the Court ordered otherwise. On March 24, 1959 plaintiff answered defendant's Interrogatories. The hearing was had under Rule to dismiss and on June 4, 1959 the Court ordered the case retained on the docket. Case set for trial on July 22, 1959 but defendant had trial date vacated. On March 11, 1960 defendant filed additional Interrogatories and plaintiff answered them. On Sept. 29, 1960 Notice of Pre-trial was sent to counsel for Oct. 12, 1960 at 1:00 P.M. On Oct. 12, plaintiff's counsel called the Court House and stated that he was preparing papers for the State Supreme Court but was not appearing before that court and could not be in Federal Court in Hammond by 1:00 o'clock.

Not so in the instant case, Respondent, Edsall, had not delayed the case or been dilatory in any of the proceedings. The delays and dilatoriness were all occasioned by the Petitioner, Penn-Central. Edsall's inability to have the case tried was the result of matters beyond his control, illness of counsel.

Unlike the *Link* case, the Edsall case was not on any call calendar for dismissal but was suddenly called for pre-trial and trial. It was not the oldest case on the docket as in *Link* (6 years) but of an age (2 years) contemporaneous with the court docket. The *Link* case was a pre-trial not requiring the mental and physical demands of an actual trial. Link's counsel was physically capable of accommodating the Court and had no real excuse not to be present. Edsall's counsel had scrupulously complied with all the requirements of procedure until incapacitated by illness.

The Court in *Link* aptly stated the rule applying to the instant case at page 741:

> *"Finally this is not a case in which failure to comply with a court order 'was due to inability fostered neither by . . . [petitioner's] (Respondent's) own conduct nor by circumstances within its (his) control.' Societe Internationale Pour Participations Industrielles et Commerciales, S/A v. Rogers,* 357 U.S. 197, 211, 2 L. Ed. 2d 1255, 1267." (Emphasis added).

In *Pond v. Braniff Airways, Inc.,* 453 F.2d 347 (5th Cir. 1972), plaintiff on July 20, 1970 was given notice of her right to sue within thirty days Braniff for employment discrimination. On April 14, 1971 the Court by pretrial notice directed counsel for Pond to prepare and submit a proposed pre-trial order, jury instructions and proposed findings of fact and conclusions of law. Pond's counsel failed to comply. When the attorneys appeared for trial, the court *dismissed the complaint without prejudice.* The dismissal barred litigation on the merits since time for filing had expired.

On reversal, the Court said that the *dismissal was an abuse of discretion* as the effect was to bar litigation on the merits of the case as the time for filing had expired and plaintiff was not a participant in the fault (p. 348).

Favorably in accord with the instant case and strongly in support of Respondent, Edsall's contention. As in Pond, there was no inadvertence on the part of Edsall's counsel but a clear and apparent reason not to dismiss on notice of counsel's illness. Similarly, the time had expired on one of Edsall's causes which cause of action was an integral part of the entire law suit.

Berardi v. The Pure Oil Corporation, 456 F.2d 98 (6th Cir. 1972), concerns appellant's failure to amend his complaint in accordance with the Court's previous order and the resultant dismissal for such failure. The Appellate Court opined that it was hard-pressed to find an abuse of dis-

cretion in the dismissal but "do so only because we believe the interests of justice require that Appellant be afforded one more opportunity to conform their pleadings to the Court's Orders."

Unquestionably in accord with Edsall and is consistent with the Sixth Circuit's decisions on abuse of discretion where "interests of justice" are to be first served.

Theilmann, Admr. v. Rutland Hospital Inc., 455 F.2d 853 (2d Cir. 1972), involves an appeal from a dismissal of suit for medical malpractice with prejudice for failure to prosecute. Plaintiff retained Bloomers in Rutland and later also retained attorney Schulman from New York. Bloomers sent Schulman the file and notice that the case was on the calendar. Schulman requested a continuance to the middle of June, 1971. On April 30, 1971, Schulman left for Spain and returned May 11, 1971. Vigers requested postponement to September and the request was denied. Case called for May 17, 1971 and jury impaneled. Bloomers conducted voir dire and trial set for next day. The Court ordered Bloomers to start case with Schulman and Vigers taking over on May 19, 1971. On May 19, Schulman appeared and argued that the case was not ready for trial and requested continuance. The Court denied continuance and Schulman stated that he could not proceed. The Court granted the Motion to Dismiss.

Not similar to instant case as Theilmann had counsel that were familiar with the case since date of filing in March, 1969. Bloomers was present as were Schulman and Vigers all physically well and capable of assisting in the trial. Schulman's unpreparedness was a result of his vacation without leave of Court.

In the case at bar, Respondent's inability to proceed was occasioned by the illness of sole counsel. No other attorney was familiar with his case. The Court had been

duly notified and the Court's Order of July 21, 1972 recognized counsel's incapacitation.

Sloup v. Hershey, 457 F.2d 148 (7th Cir. 1971), concerns a third year law student seeking an order in the nature of Mandamus to cancel an induction order, reopen his 1-a classification, reclassify him 1-S(C) and enjoin all defendants. Before hearing, the induction order was indefinitely postponed. In an ex parte proceeding, the injunction was denied with plaintiff agreeing that the matter might be administratively resolved. The Court ordered the case removed from the active calendar with leave to reinstate the suit within ninety (90) days. The 90 day period expired and plaintiff finished law school in June of 1970. On October 22, 1970, plaintiff was ordered to report for induction. On Nov. 9, 1970 he moved for reinstatement of his case and to enjoin the induction. The Court dismissed for want of prosecution. Appeals Court Affirmed.

Not similar to the instant case. Sloup agreed to the 90 day continuance. Classification 1-S(C) is a student deferment. He graduated before being ordered for induction. His purpose was accomplished (p. 150).

Respondent, Edsall, was afforded no such consideration although he had a greater stake in his day in Court on the merits of his suit. The purpose of his case had not been served before dismissal. He was prepared for trial but could not proceed without counsel.

In *Bautista v. Concentrated Employment Program of the Department of Labor et al.,* 459 F.2d 1019 (9th Cir. 1972), Appellant filed a Complaint on July 3, 1968 which was dismissed with leave to amend by September 25, 1969. The Appellees filed Interrogatories May 19, 1970. Litigation halted until March 4, 1971 when the Clerk pursuant to Local Rule notified the parties to appear on April 25th to show cause why the case should not be dismissed for

want of prosecution. Appellant did not respond to the Show Cause Order. On May 1, 1971 Appellant answered Appellees Interrogatories. Two weeks later Appellant served Interrogatories. At hearing on July 25, 1971, case was dismissed.

Not similar to the case at bar as all of the delays, except for the illness of Respondent's counsel, were occasioned by the Petitioner.

Importantly, Appellant, Bautista, was given an opportunity to explain why the case should not be dismissed. Such an opportunity to show cause was not afforded the Respondent in the instant case. The *Bautista* case was over three years old.

The cases of *Pond* and *Berardi, supra,* and Edsall, the instant case, are uniform in the application of law that the lower Court should be reversed "in the interest of justice" from the resulting abuse of discretion by the Trial Court.

While in *Theilmann, Sloup, Bautista* and *Link, supra,* the issue of "abuse of discretion" may have been raised or inferred, the cases are in harmony upon their independent facts and the application of the law and are not in discord with *Pond, Berardi* or Edsall, *supra.*

In *Theilmann, Sloup, Bautista* and *Link,* the abuse in each case resulted from the dilatoriness or neglect in claimants' Counsel's failure to comply with procedural requirements preparatory to the trial of their cases after considerable indulgence by the Courts which extended over a period of years.

On the independent facts of each case and the application of the law, *Theilmann, Sloup, Bautista* and *Link* are uniform and harmonious with *Pond, Berardi* and Edsall and no conflict exists in the decisions between the enumerated Circuit Courts.

Decisions of This Court and Its Inferior Courts Support the Challenged Judgment

The decisions cited by the Petitioner support the contentions of the Respondent that the Trial Court committed an abuse of discretion in ordering the replacement of counsel or dismissal of the lawsuit if Respondent was unable to proceed on September 5, 1972 because of counsel's illness and, particularly, where the time allotted was insufficient to find new counsel and permit him the opportunity to become familiar with the intricacies of the case.

No latitude for a further continuance was given Respondent even though the circumstance giving rise to the matter warranted such consideration. This strict approach put Respondent in the extremely unjust situation of finding at his peril new counsel or face dismissal if his counsel who had spent two years developing the case was not well by the trial date.

Under the rather strained circumstances of *Hunter v. Fairfax's Devisee,* 3 (U.S. Reports) Dallas 305 (1796), where the plaintiff-in-error had previously obtained a postponement of the trial for one term and was now seeking a continuance for another term (death of counsel), the Court in adopting a liberal approach to the request by letter to extend the trial date said: "In all questions of this nature, we must be governed by a sound discretion; in order to prevent on the one hand, an unnecessary procrastination, and on the other hand, to avoid an injurious precipitation of trials.", and found that the magnitude of the case dictated that replacement counsel should have the opportunity to investigate the principles and to consider the authorities connected with it, out of term, and unencumbered by the pressures of current business of the Court.

Respondent's claim is complex and intricate since the factual situation is unique from that of any other F.E.L.A. case reported and the medical foundation of the case is unusual in that it necessitates the developement of causal relations between the blow on the head and the subsequent heart attack.

Other Federal Courts have uniformly followed the rule as announced in *Hunter v. Fairfax, supra,* in respects to illness of counsel.

The case of *Rankin v. Shayne Brothers, Inc.,* 280 F. 2d 55 (C.A. Dist. Col. Cir. 1960), concerns the abuse of discretion by the District Court in dismissing an action of plaintiff, pending about four years, upon circumstances including the illness and incapacitation of counsel which necessitated temporarily the discontinuance of his practice.

While in *Foxboro Company v. Fischer & Porter Company,* 29 F.R.D. 522 (U.S.D.C., E.D. Pa.) 1961, the Court refused in a case pending over three years to dismiss where the defendant was largely responsible for the delay.

Other decisions:

Nowaczyk v. Welch (Ill. 1969), 245 N.E.2d 894, 896, 897 where counsel for plaintiff became ill and could not go forward with the case. On appeal the Court reversed as the dismissal for want of prosecution was an abuse of discretion since counsel was in no physical condition to try the case and that illness was ample grounds to postpone the trial. *Thompson v. Hays,* 45 S.E. 970, wherein sole counsel for the defendant stated that he was too unwell to attend to any business and could not go to trial, it was error not to grant the continuance. *Courtney v. Central Trust Co.* (Supreme Ct. Fla. 1933), 150 So. 276, defendant counsel's wife was seriously ill and he was

not in any fit mental state to try the case. The cause was tried by a replacement attorney and the judgment was against the defendant. The Supreme Court on a finding of abuse of discretion reversed and ordered a new trial stating, "when a trial judge perceives that in consequence of inadvertence of counsel, or other cause, the rigid enforcement of rules of procedure would defeat the great object for which they were established, it is the duty to so relax them (when it can be done without injustice to any) as to make them subserve their true purpose, which is to promote the true administration of justice.", and further stating that sole counsel should be afforded every opportunity to try the case as clients rely on the particular skills attorneys are supposed to possess.

In *Baillio v. Wilson* (La. 1827), 6 Martin Reports N. S. 334, 335, reversing judgment for refusal to grant a continuance on the ground of sickness of her leading, and, indeed, only attorney and that the sickness and consequent incapacity of counsel is good ground for allowing it and *Marrero, et al. v. Nunez, et al.* (1848), 3 La. Ann. 54, continuance should be granted in the furtherance of justice when unforeseen illness of counsel occurs and the case is a complicated one which counsel had sole control for many years and previous delays were not imputable to the attorney of the plaintiff.

CONCLUSION

The Writ should be denied.

Respectfully submitted,

JOHN RUFFALO
510 Mahoning Bank Building
Youngstown, Ohio 44503
Attorney for Respondent

APPENDIX

DOCKET ENTRIES OF THE DISTRICT COURT

IN THE DISTRICT COURT OF THE UNITED STATES
For The Northern District of Ohio, Eastern Division

Civil Action No. C 70-594

DOCKET ENTRIES

1970

June 25. Complaint filed.

June 25. Summons issued. Copy of summons to the Marshal.

July 27. Stipulation and Order granting deft. leave to move or answer until 8/28/70 filed. Thomas, J. Notice waived. (Docketed 7/27/70)

July 28. Summons returned and filed. Served 7-8-70. $3.00 (pd)

Aug. 28. Stipulation and Order granting deft. leave to move or answer until 9/28/70 filed. Kalbfleisch, J. Notice waived. (Docketed 8/28/70)

Sept. 28. Answer of deft. filed. Copy mailed 9/28/70

Oct. 28. Request for trial filed.

1971

July 2. Interrogatories Propounded by Pltf filed. Copy mailed 7/1/71 (6)

Aug. 2. Motion of deft. for leave to answer or object to interr. with affidavit in support filed. Copy mailed 8/2/71

1971

Aug. 11. Endorsed order granting Motion of Deft for leave 30 days in which to answer or object Pltf's Interrogatories filed Krupansky, J. Copies to Skulina & Ruffalo. (Docketed 8/12/71)

Sept. 10 Mo. of deft. for leave to answer or object to pltf's interr. by 10/1/71 filed. Copy mailed 9/9/71.

Sept. 20. Endorsed order granting mo. of deft. for leave to answer or object to interr. by 10/1/71 and stating no further leaves will be allowed, Krupansky, J. Copies to Ruffalo & Skulina. (Docketed 9/20/71)

Oct. 1. Answers of deft. to Interrogatories filed. Copy mailed 10/1/71.

1972

July 5. Minutes of pre-trial proceedings filed, Krupansky, J. (Trial 7/27)

July 5. Pre-trial order filed, Krupansky, J. Copies to Ruffalo and Skulina. (Docketed 7/5/72)

July 11. Interrogatories by Deft to be answered by Pltf filed. Copy mailed 7/11/72

July 19. Motion of Deft. Penn Central for production of documents and for Protective Order with memorandum in support of Motion filed. Copy mailed 7/19/72.

July 21. Order continuing trial to 9/5/72; no add. continuance will be granted; further that replacement counsel will be prepared to proceed at trial if atty. Ruffalo cannot; further that mo. of deft. for prod. of docu. is granted and said documents will be produced by not later than 7/27/72 filed, Krupansky, J. Copies to Ruffalo and Skulina. (Docketed 7/24/72)

July 26. Brief of Pltf in opposition to Deft's Motion for production and Protective Order filed. Copy mailed 7/25/72.

1972

July 28. Motion of Pltf for reconsideration and to vacate Order with Memorandum in support of Motion and Exhibit "A" filed. Copy mailed 7/27/72.

Aug. 10. Reply of Deft. Penn Central to Pltf's Motion for Reconsideration & Request to vacate Court's Order filed. Copy mailed 8/10/72.

Aug. 14. Answers of Pltf to interrogatories propounded by Deft filed. Copys mailed 8/14/72.

Aug. 18. Order denying Pltf's Motion for reconsideration & to Vacate filed. Krupansky, J. Copies to Skulina and Ruffalo. (Docketed 8/21/72)

Aug. 29. Notice of Appeal by Pltf filed. Copies by Clerk to Dolan and Ruffalo.

Aug. 29. Bond for costs filed. (Ohio Farmers Insurance Co.)

Sept. 6. Order dismissing case without prejudice for want of prosecution at plaintiff's costs filed. Krupansky, J. Copy to Ruffalo & Skulina. (Docketed 9/7/72)

Sept. 28. Certified original pleadings mailed to the Clerk for the Court of Appeals for the Sixth Circuit.

Oct. 10. Certified record received in U.S.C.A. & filed. 10/6/72 #72-1995.

Oct. 6. Notice of Appeal by Pltf filed.

Oct. 6. Bond for costs filed.

Dec. 7. Certified Supplemental Pleadings Nos. 23 & 24 mailed to the Clerk for the U.S.C.A. for the Sixth Circuit.

PHYSICIAN'S LETTER

JOHN N. McCANN, M.D.
2710 Mahoning Avenue
Youngstown, Ohio 44509

Phone 799-1507

July 19, 1972

To Whom It May Concern:

After physical examination of Mr. John Ruffalo - his condition requires the consultation of a specealist and I have advised him to cease activities for a period of 1 month. His physical condition will be reevaluated in 4 weeks.

/s/ John N. McCann M.D.

MOTION FILED IN COURT OF APPEALS

(Filed October 30, 1972)

Case No. 72-1995

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

LEONARD L. EDSALL,
Appellant,

vs.

PENN CENTRAL TRANSPORTATION COMPANY,
Appellee.

MOTION FOR ENLARGEMENT OF TIME

1. The Appellant hereby respectfully moves the Court for an extension of time within which to file his Brief and Appendix for the following reasons:

That Counsel for Plaintiff-Appellant has been ill for some period of time and is on the 29th day of October, 1972 being admitted to a hospital for an operation. Counsel for the Appellant says that he will be incapacitated for a period of about six weeks and will need additional time in which to prepare his Brief and Appendix.

2. Therefore, Appellant respectfully requests that the time in which he is required to submit his Brief, Appendix or other documents and things be extended to and including December 31, 1972.

/s/ JOHN RUFFALO
Attorney for Appellant

Final extension to 12/15/72 granted. Entered by the Clerk pursuant to Rule (4F) Sixth Cir. Rules.

/s/ JAMES A. HIGGINS
Clerk